

"COMPULSORY ARBITRATION"—WHAT IS IT?

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THE identification of arbitration as it is constituted in legal lore is not very difficult. There is a near consensus of judicial utterances and statutory provisions posing it as a process for hearing and deciding controversies of economic consequence between parties. It begins with and depends upon an agreement between the parties to submit their claims to one or more persons chosen by them to serve as their arbitrator.¹

The identification of "compulsory arbitration" is more difficult; it is more elusive.²

The instances or particulars of "compulsion" as covered by the name "compulsory arbitration" in legal lore, vary substantially. They are to be found in different statutes. The administration of these "compulsions" and the consequences of disregarding them also are variable.³

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1. See Sturges, *Arbitration—What Is It?*, 35 N.Y.U.L. Rev. 1031 (1960).

2. For example, a single state statute has been cited in one case as embodying "compulsory arbitration," "arbitration" (with no attending adjective), "arbitral scheme," and "enforced arbitration." *Amalgamated Ass'n of St. Elec. Ry. Employees v. Wisconsin Employ. Rel. Bd.*, 340 U.S. 383 (1951) (Frankfurter, J., dissenting). See also *Local 170, T. W. U. v. Gadola*, 322 Mich. 332, 34 N.W.2d. 71 (1948); *Mengel Co. v. Nashville Paper Prods. Union*, 221 F.2d 644 (6th Cir. 1955). "Boards of arbitration," "courts of arbitration" and "compulsory boards of arbitration" also appear now and then. See *In re Bill Relating to Arbitration*, 9 Colo. 629, 21 Pac. 474 (1886); *New Orleans City & L. R.R. v. State Bd. of Arbitration*, 47 La. Ann. 874, 17 So. 418 (1895); *Renaud v. State Court of Mediation & Arbitration*, 124 Mich. 648, 83 N.W. 620 (1900); *Fairview Hosp. Ass'n v. Public Bldg. Serv. Union*, 241 Minn. 523, 64 N.W.2d 16 (1954), 39 Minn. L. Rev. 322 (1955).

3. That the "compulsion" to arbitrate may be deemed so insubstantial that it may be disregarded when weighing the constitutionality of the legislation providing for it, see the *Pennsylvania Compulsory Submission Act*, Pa. Stat. Ann. tit. 5, §§ 21-31 (1930) (Supp. 1960). Again, a legislative negation to a party may survive the constitutional challenge of being the "compulsion" making up "compulsory arbitration." Thus, legislation denying a carrier (employer), subject to the *Railway Labor Act*, 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-64, 181-83 (1958), access to the federal courts to seek an injunction under the *Norris-La Guardia Act*, 47 Stat. 70 (1932), as amended, 29 U.S.C. §§ 101-15 (1958), because of its refusal to enter upon voluntary arbitration with the union of its employees has been declared not to constitute "compulsory arbitration." The Supreme Court explained this as follows: "Respondent's failure or refusal to arbitrate has not violated any obligation imposed upon it, whether by the *Railway Labor Act* or by the *Norris-La Guardia Act*. No one has recourse against it by any legal means on account of this failure. Respondent is free to arbitrate or not, as it chooses. But if it refuses, it loses the legal right to have an injunction issued by a federal court or, to put the matter more accurately, it fails to perfect the right to such relief. This is not compulsory arbitration. It is compulsory choice between the right to decline arbitration and the right to have the aid of equity in a federal court." *Brotherhood of R.R. Trainmen v. Toledo*,

Joinder of any of these instances or particulars of "compulsion" with arbitration seems to serve no useful purpose in evaluating their legality. Some of them appear to be an anathema to parties in interest and to politicians.⁴ Other and different instances have been cited as praiseworthy.⁵ Arbitration does not count for much in resolving these likes and dislikes.

Perhaps the closest tie of "compulsory arbitration" to arbitration, as generally and traditionally understood in legal circles, is to be found in judicial opinions dealing with the enforcement of arbitration agreements as provided in arbitration statutes of the 1920 New York pattern.⁶ Arbitration agreements qualifying under those statutes are de-

P.&W. R.R., 321 U.S. 50, 63 (1944). Compare *Brotherhood of R.R. Trainmen v. Chicago R.&I. R.R.*, 353 U.S. 30 (1957).

Some other requirements in the legislation may be too negative or temporizing to be indicted for unconstitutionality as "compulsory arbitration." In Sanders, *Types of Labor Disputes and Approaches to Their Settlement*, 12 *Law & Contemp. Prob.* 211 (1947), the following observation is made: "Requirements that parties give notice and postpone during a 'cooling-off' period the use of their economic power to engage in a strike or lockout, that they submit their disputes to certain processes of mediation or to investigation and fact-finding before using such power, are measures which partake of compulsion, but they do not constitute compulsory arbitration unless coupled with the requirement that there be compliance with a decision imposed from the outside." *Id.* at 217.

4. The "compulsory arbitration" which is associated with certain legislation relating to employer-employee relationships is so affected. See Schwartz, *Is Compulsory Arbitration Necessary?*, 15 *Arb. J. (n.s.)* 189 (1960). In Syme, *The Public Emergency Dispute: Its Various Aspects and Some Possible Solutions*, 26 *Temp. L. Q.* 383 (1953), M. Herbert Syme makes the following criticism of "compulsory arbitration": "Compulsory Arbitration is repugnant to our whole democratic process. What is more, it just does not work. It does not assure continuous production. The parties do not accept imposed settlements. They merely bide their time and wait for an opportunity at retaliation. Where compulsory arbitration has been tried, it has not worked. Australia and New Zealand have had compulsory arbitration since 1904 and 1894, respectively. They still have strikes. The fact is that workers won't work unless they want to, and the only way to keep them at work is to keep them wanting to work. To quote Will Davis: 'The determination of a controversy between free citizens by the edict of government is not a peaceful thing and it is not a settlement. It is an enforced termination of warfare and it settles nothing.'" *Id.* 391-92. See also, Nurick, *Compulsory Arbitration of Labor Disputes Affecting Public Utilities*, 54 *Dick. L. Rev.* 127 (1949-1950); Stanford, Schwartz, *supra*; *Compulsory Arbitration—A Solution for Industrial Decay?*, 13 *U. Pitt. L. Rev.* 462 (1952); Note, 49 *Colum. L. Rev.* 661 (1949).

5. This is true of the "compulsory arbitration" provided by the Pennsylvania Compulsory Submission Act, *supra* note 3. See Swartz, *Compulsory Arbitration: An Experiment in Pennsylvania*, 42 *A.B.A.J.* 513 (1956); Note, 31 *N.Y.U.L. Rev.* 1316 (1956); Note, 8 *Stan. L. Rev.* 410 (1956); Comment, 2 *Vill. L. Rev.* 529 (1957). Compare, Rosenberg & Schubert, *Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*, 74 *Harv. L. Rev.* 448 (1961).

6. N.Y. Sess. Laws 1920, ch. 925 §§ 1410-31, now N.Y. Civ. Prac. Act §§ 1448-69. See also the United States Arbitration Act, 9 U.S.C. §§ 1-14 (1958).

clared valid, irrevocable, and enforceable. Precise remedies are provided which may be invoked by a party to the agreement in order to make the agreement irrevocable and enforceable. This is a departure from the common-law rule that arbitration agreements are both revocable and non-enforceable. Although the parties shall have entered upon their arbitration agreement deliberately for reasons appealing to them respectively, there has been some disposition by the judiciary, while resolving considerations upon granting or denying an application for specific performance pursuant to the statute, to couch the project in terms of an endeavor to bring on "compulsory arbitration."⁷ On the other hand, it has been denied that "compulsory arbitration" is involved by such proceedings.⁸ It is not very clear in either instance just what should be understood as being the make-up of the "compulsory arbitration" mentioned therein.

It is clear, however, that whatever "compulsion" may be reckoned from these statutory provisions for the enforcement of the arbitration agreements, it does not constitute a basis for an effective challenge to the constitutionality of the statutes in any likeness of any unconstitutionality ruled against legislation regarded as embodying "compulsory arbitration" as used in other contexts.⁹

7. See, e.g., *Connecticut Co. v. Division 425, of Amalgamated Ass'n of St. Elec. Ry. Employees*, 147 Conn. 608, 164 A.2d 413 (1960); *Weidlich, A Test of Compulsory Arbitration in New York*, 4 Conn. B.J. 95 (1930). See also *Brotherhood of R.R. Trainmen v. Chicago R. & I.R.R.*, 353 U.S. 30 (1957).

8. In *the Matter of Buffalo & E. Ry.*, 250 N.Y. 275, 279, 165 N.E. 291, 292 (1929) (Pound, J., dissenting); *Katakura & Co. v. Vogue Silk Hosiery Co.*, 307 Pa. 544, 161 Atl. 529 (1932).

9. See *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263 (1932); *Berkovitz v. Arbib & Houlberg, Inc.*, 230 N.Y. 261, 130 N.E. 288 (1921). See also *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151 (1931); *Henderson v. Ugalde*, 61 Ariz. 221, 147 P.2d 490 (1944); *In re Bill Relating to Arbitration*, 9 Colo. 629, 21 Pac. 474 (1886); *People ex rel. Baldwin v. Haws*, 37 Barb. 440, 24 How. Pr. 148 (N.Y. Sup. Ct. 1862). The course of the judicial process in associating issues as to the granting or denying of specific enforcement of the arbitration agreement under these statutes has its own special interest. Pursuit by a would-be buyer of specific enforcement of his claim to purchase some land, as written in his contract for the purchase and sale of the land, seems not to become entangled with considerations of compulsory conveyances. Why, then, should considerations upon the specific enforcement of arbitration agreements raise any considerations of the not very meaningful or reputable entity called "compulsory arbitration"? On occasion, moreover, making men honor specifically and fully their arbitration agreements should raise all the virtues involved in having men honor their contracts generally. See, e.g., the views and decision in *Nippon Ki-Ito Kaisha, Ltd. v. Ewing-Thomas Corp.*, 313 Pa. 442, 170 Atl. 286 (1934).

On the other hand, pursuit of specific enforcement of my contract with Lady X to have her sing in my theatre (and not in that of my competitor) is likely to involve me seriously in a quest for "involuntary servitude," if not other and additional items of ostracism. Why no "compulsory conveyances" in the one case; why the "involuntary servitude" in the

"Compulsory arbitration" appears to be put to use most frequently in connection with certain legislation affecting labor relations of employer and employees; rarely does it show up in connection with legislation covering commercial transactions or practices. Labor legislation which comprehends "compulsory arbitration" generally is designed to solve disputes arising between employer and employees over wages or other terms or conditions of employment so as to forestall production stoppages by strike or lockout. More recently most of this labor legislation has been limited to public utilities and their employees.¹⁰ It has been enacted in only a few states.¹¹ As will appear in the review below, a more or less deliberative process of hearing and deciding such disputes generally has been provided in the legislation. Sometimes those who hear and decide are referred to in the statutes as "arbitrators" or as a "board of arbitration"; in others there is no such reference. Sometimes the process of hearing and deciding is referred to in the legislation as "arbitration"; in other statutes there is no such reference. Two ideas pervade the statutes. First, the process of disposing of the grievance claims thereunder is not dependent or conditioned upon any agreement for arbitration to be entered into by the parties of their own volition. Secondly, if the parties do not settle these claims the government will do it for them—with varying sanctions upon the parties.

One specification of this "compulsory arbitration" has been only modestly publicized outside the legal dictionary of its author—Bouvier. "Compulsory arbitration," according to Bouvier, "is that [arbitration] which takes place *when the consent of one of the parties is enforced by statutory provision.*"¹² The Supreme Court of Washington seems to have

other? Probably it is best to believe that this process of association as used in the opinions of some cases, but not others, implies at least a variability of argumentative technique and the use of emotive appeal to implement it. Bills to enact laws patterned after the 1920 New York arbitration statute have been opposed many times. Frequently the opposition has emphasized that such legislation, in making irrevocable arbitration agreements which otherwise are not enforceable, is the making of "compulsory arbitration"—thereby impaling the pending bill upon something abhorrent, something that should not be.

10. See Garshof, *A Comparative Study of Compulsory Arbitration of Labor Disputes in Public Utilities*, 5 Miami L. Q. 601 (1951); Nurick, *Compulsory Arbitration of Labor Disputes Affecting Public Utilities* (with extensive bibliography), 54 Dick. L. Rev. 127 (1949-1950); Schwartz, *Is Compulsory Arbitration Necessary?*, 15 Arb. J. (n.s.) 189 (1960); Updegraff, *Compulsory Settlement of Public Utility Disputes*, 36 Iowa L. Rev. 61 (1950); Note, 49 Colum. L. Rev. 661 (1949).

11. E.g., Fla. Stat. Ann. § 453.01-.18 (1952); Hawaii Rev. Laws §§ 91-1 to -16 (1955); Ind. Ann. Stat. §§ 40-2401 to -2415 (1952); Md. Ann. Code art. 89, §§ 14-24 (1957); Mich. Comp. Laws §§ 423.13-.13g (1948); Minn. Stat. Ann. §§ 179.07-.08 (1946); Mo. Ann. Stat. §§ 295.010-.210 (1952); Neb. Rev. Stat. § 48-801 to -823 (1960); Pa. Stat. Ann. tit. 43, §§ 213.1-.16 (1952); Va. Code Ann. §§ 40-95.1 to -95.6 (1953); Wis. Stat. Ann. §§ 111.50-.65 (1957).

12. 1 Bouvier, *Law Dictionary* 31 (Lib. ed. 1928) (Emphasis added.)

been the first and possibly the only American court to accept and apply this definition. It did so in 1900 in *Wood v. City of Seattle*.¹³

By legislative prescription in its charter, the City of Seattle was required, when granting a franchise to construct and operate a street railway, to incorporate in the grant of franchise, "efficient provisions for the compulsory arbitration of all disputes" arising between the grantee of the franchise and its employees "as to any matter of employment and wages,"¹⁴ unless a majority of the electors voting upon the question authorized the franchise without such a provision. The grant of franchise provided that "if any dispute shall at any time arise between the said grantees, their successors or assigns, and their employees, as to any matter of employment or wages, such dispute shall be submitted to arbitration."¹⁵ It was further provided that the grantee of the franchise and its employees "shall be parties to any submission, and shall be entitled to be heard by the arbitrators . . ."¹⁶ and that an award would be binding and conclusive upon both parties for one year. The court found this to be an efficient provision for the "compulsory arbitration" of the designated disputes as required by the city's charter.

How could this contractual provision be the basis for "compulsory arbitration"? What was the make-up of the "compulsory arbitration" contemplated by the provision? The court concluded that the provision squared with Bouvier's definition of "compulsory arbitration," because, in order to gain enforcement of the provision, the city had to look to the grantee of the franchise. The city could not compel the employees to submit any dispute to arbitration. Given this one-sided compulsion (on the employer alone), there was derived the "compulsory arbitration" involved by the provision.¹⁷

Another and somewhat similar specification of "compulsory arbitration" in the labor-management field was brought to light by the Supreme Court of the United States in *Wilson v. New*.¹⁸ In this case the court

13. 23 Wash. 1, 62 Pac. 135 (1900). In the most recent revision of Bouvier the foregoing definition of "compulsory arbitration" is repeated. To it is cited, as for authentication, *Wood v. City of Seattle*, supra. 1 Bouvier, Law Dictionary 226 (Rawle's 3d Rev. 8th ed. 1914).

14. 23 Wash. at 6, 62 Pac. at 137.

15. Id. at 9, 62 Pac. at 138.

16. Ibid.

17. In *Grand Rapids City Coach Lines v. Howlett*, 137 F. Supp. 667, 672 (W.D. Mich. 1955) Bouvier is again quoted for his foregoing definition of "compulsory arbitration." It is difficult, however, to appreciate the significance of the definition in the given case; and it is equally difficult to find therein the one-sided "compulsion" contemplated by Bouvier.

18. 243 U.S. 332 (1917).

was called upon to rule on the constitutionality of the Adamson Act.¹⁹ That statute enacted the eight hour standard day for work and for the reckoning of compensation for employees of interstate railroads. Most of the railroads of the country had refused demands by their employees to accept and use such a standard day, and a national strike shadowed the Congress pending the enactment of the law.

This act was likened to arbitration and referred to as a "compulsory arbitration" law in the Supreme Court as follows: the Solicitor General, seeking to sustain the constitutionality of the law argued that it embodied "the idea of the board of arbitration"; that this idea had been adopted therein "though the regulation is accomplished by direct action of Congress rather than the instrumentality of a commission."²⁰ Mr. Chief Justice White for the majority of the Court, pointed out that the President had been unsuccessful in gaining a settlement between the parties and that the President had sought the enactment of such a law as the Adamson Act because "no resources at law were at his disposal for compulsory arbitration . . .";²¹ that, according to the Chief Justice, the act was within the constitutional power of Congress for

in substance and effect it amounted to an exertion of its authority under the circumstances disclosed to compulsorily arbitrate the dispute between the parties by establishing as to the subject matter of that dispute a legislative standard of wages operative and binding as a matter of law upon the parties—a power none the less efficaciously exerted because exercised by direct legislative act instead of by the enactment of other and appropriate means providing for the bringing about of such result.²²

The Chief Justice concluded:

Congress had the power to adopt the act in question, whether it be viewed as a direct fixing of wages to meet the absence of a standard on that subject resulting from the dispute between the parties or as the exertion by Congress of the power which it undoubtedly possessed to provide by appropriate legislation for compulsory arbitration—a power which inevitably resulted from its authority to protect interstate commerce in dealing with a situation like that which was before it. . . .²³

Mr. Justice McKenna, in his concurring opinion, does not seem to have picked up the term "compulsory arbitration," while Mr. Justice McReynolds, who dissented, viewed the statute as designed "to require compulsory arbitration."²⁴ Justices Pitney and Van Devanter, both of whom also dissented, considered the statute as the imposition by Congress of

19. 39 Stat. 721 (1916), 45 U.S.C. §§ 65, 66 (1958).

20. 243 U.S. at 335.

21. *Id.* at 342.

22. *Id.* at 351-52.

23. *Id.* at 359.

24. *Id.* at 389.

"its arbitral award upon the parties in a dispute about wages. . . ."²⁵ Mr. Justice Day, in his dissent, took the view that it was unnecessary "to decide, as declared in the majority opinion, that in matters of this kind Congress can enact a compulsory arbitration law . . .";²⁶ that the question was not involved in this case. Whether or not the Adamson law would be claimed by Bouvier to constitute "compulsory arbitration" of course, is unknown.

We meet another and different "compulsory arbitration" in the Supreme Court in 1924, in cases involving constitutionality of the Kansas statute²⁷ establishing an Industrial Relations Court in that state. In *Wolff Packing Co. v. Court of Indus. Relations*,²⁸ Mr. Justice Van Devanter, in returning the unanimous opinion of the Court, summarized the provisions of the statute as follows:

The declared and adjudged purpose of the Act is to ensure continuity of operation and production in certain businesses which it calls "essential industries." To that end it provides for the compulsory settlement by a state agency of all labor controversies in such businesses which endanger the intended continuity. It proceeds on the assumption that the public has a paramount interest in the subject which justifies the compulsion. The businesses named include, among others, that of manufacturing or preparing food products for sale and human consumption. The controversies to be settled include, among others, those arising between employer and employees over either wages or hours of labor. The state agency charged with the duty of making the settlement is the Court of Industrial Relations. Although called a court it is an administrative board. It is to summon the disputants before it, to give them a hearing, to settle the matter in controversy—as by fixing wages or hours of labor where they are what is in dispute—to embody its findings and determination in an order, and, if need be, to institute mandamus proceedings in the Supreme Court of the State to compel compliance with its order.²⁹

Clearly enough, it seems, this legislation purported to compel both parties to submit to arbitration, rather than only one of them.

Following closely upon this summary of the statute, the Justice turned to those references made in the Court's opinions in some of the earlier cases before it relating to the Kansas statute wherein it had been declared that the act established "compulsory arbitration."³⁰ He adverted to these references in order to take note of the criticism of that characterization which had been voiced by the Supreme Court of Kansas. The Kansas court³¹ had observed that

25. Id. at 387.

26. Id. at 372.

27. Kan. Laws Spec. Sess. 1920, ch. 29.

28. 267 U.S. 552 (1925).

29. Id. at 563.

30. Id. at 564.

31. *State v. Howat*, 116 Kan. 412, 227 Pac. 752 (1924), *aff'd sub nom.*, *Dorchy v. Kansas*, 272 U.S. 306 (1926).

the court of industrial relations act undertook to provide a method of settling industrial disputes in essential industries, by a scheme which the Supreme Court of the United States miscalls compulsory arbitration. Justice was to be done between employer and employee, but protection of the public interest was to be paramount, and the public interest is not a subject of arbitration. Besides that, the Constitution and functions of the tribunal forbade its classification as an arbitral body.³²

Mr. Justice Van Devanter conceded for the Supreme Court that the statute did not comprehend arbitration but he brushed aside the view of the Kansas court by declaring with respect to the statute that "its nature is fairly reflected when it is spoken of as compulsory arbitration."³³ What the Justice may have had in mind is not very clear; "compulsory" was still retained by him as an adjunct of "arbitration." The full text of the Justice's opinion in this connection was as follows:

On three occasions when the Act was before us we referred to it as undertaking to establish a system of "compulsory arbitration." . . . The Supreme Court of the State in a recent opinion criticizes this use of the term "arbitration" We recognize that in its usual acceptation the term indicates a proceeding based entirely on the consent of the parties. And we recognize also that this Act dispenses with their consent. Under it they have no voice in selecting the determining agency or in defining what that agency is to investigate and determine. And yet the determination is to bind them even to the point of preventing them from agreeing on any change in the terms fixed therein, unless the agency approves. To speak of a proceeding with such attributes merely as an arbitration might be subject to criticism, but we think its nature is fairly reflected when it is spoken of as a compulsory arbitration. Of course, our present concern is with the essence of the system rather than its name.³⁴

One struggles in vain to catch the need for, or the usefulness of, the term or concept "compulsory arbitration" as presented by the Supreme Court of the United States in the foregoing cases. It is not apparent how the coinage of the term aided, or militated for or against the constitutionality of the respective statutes. The Adamson law was sustained in the one case; the Kansas Industrial Court Act was ruled unconstitutional in the other.

While federal and state statutes abound with regulations of business units, commercial transactions and practices, including rates and terms and conditions of services rendered, none of this legislation appears to have been incorporated in "compulsory arbitration."³⁵ Why that name comes to the fore, or for what useful purpose, in connection with statutes looking to restraints upon work stoppages, which may come to pass in connection with disputes arising between an employer and his employees,

32. 116 Kan. at 415, 227 Pac. at 754. See also the views advanced by the New Jersey Court in *State v. Traffic Tel. Workers*, 2 N.J. 335, 354, 66 A.2d 616, 626 (1949).

33. 267 U.S. at 565.

34. *Id.* at 564-65.

35. See *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151 (1931).

is not clear. Mr. Justice Van Devanter's explanation, with respect to the Kansas Industrial Court Act, that "its nature is fairly reflected when it is spoken of as a compulsory arbitration," and that, at all events, the "present concern" of the Court was with respect to "the essence of the system rather than its name,"³⁶ invites questions as to what was the makeup of his "compulsory arbitration" which "fairly reflected" the nature of the legislation, and how close to, or remote from, "the essence of the system" was his "compulsory arbitration." The tenor of the opinion in this connection seems to have been more a "brush off" of the criticism by the Kansas court than anything else.³⁷

Remoteness of resemblance (if any) of "compulsory arbitration" to arbitration generally, has been further developed in more recent decisions relating to the foregoing state statutes governing labor disputes arising with public utilities. Thus, even when the statute formally prescribes that the parties shall join in the "submission" of their controversies and that they shall, or may, appoint "arbitrators" to hear and decide the issues, it is clear that the legislation does not plan that the "arbitrators" shall act like either common-law or statutory arbitrators. Prescription of "standards" in the statute to rule the process of those who are to hear and decide has been held by state courts to go to the very constitutionality of the legislation. The prescription has been deemed necessary to qualify the legislation against unconstitutional delegation of legislative power to an administrative agency.³⁸ Whether this

36. 267 U.S. at 565.

37. Whether the Kansas Industrial Court was a court or an administrative agency may not be very significant in evaluating its decision. In any event the thought has been advanced that to vest the powers of "compulsion" derived from the labor legislation now under consideration in the courts would not save it from the illegalities of "compulsory arbitration." "It is frequently urged that courts should resolve all labor disputes. It should be noted that such proposals involve compulsory arbitration. The mere fact that the third-party function is performed by a court does not relieve the process of its compulsory character, nor remove the basic objection in contract-negotiation disputes that a non-contractual solution is imposed upon the parties." Sanders, *Types of Labor Disputes and Approaches To Their Settlement*, 12 *Law & Contemp. Prob.* 211, 217 (1947).

38. In *State v. Traffic Tel. Workers*, 2 N.J. 335, 66 Atl. 616 (1949), 35 Cornell L.Q. 631, 44 Ill. L. Rev. 546, the court spoke of the "Board of Arbitration" provided in the statute as "the administrative agency" and declared upon the necessity of "standards" as follows: "Furthermore, in the absence of standards, the very term board of arbitration carries with it the implication that the board will act in the way that arbitrators customarily act, not according to established criteria but according to the ideas of justice or of expedience of the individual arbitrators." 2 N.J. at 353, 66 Atl. at 626. See *Jersey Bell Tel. Co. v. Communications Workers*, 5 N.J. 354, 370, 75 A.2d 721, 729 (1950); Note, 49 Colum. L. Rev. 661 (1949); Note, 17 Geo. Wash. L. Rev. 367 (1948-1949). See also *Local 170 T.W.U. v. Gadola*, 322 Mich. 332, 34 N.W.2d 71 (1948); *Fairview Hospital Ass'n v. Public Bldg. Serv. Union*, 241 Minn. 523, 64 N.W.2d 16 (1954), 39 Minn. L. Rev. 322 (1955).

legislative delegation of legislative power may also be an unconstitutional delegation of judicial power is a matter which has not passed unnoticed.³⁹ These state "compulsory arbitration" statutes also must be measured by constitutional considerations of preemption by acts of Congress over competitive state statutes.⁴⁰

Writers on "compulsory arbitration," especially those taking account of the state statutes relating to labor relations of utility companies, have been disposed to subordinate the role of arbitration therein and to emphasize the compulsory settlement of the given disputes by act of government. Thus, Professor Williams identifies "compulsory arbitration" as follows:

The phrase "compulsory arbitration" has commonly come to mean any system whereby the parties to a labor dispute are forced by the government to submit their dispute to final settlement by some third party. The usual modes of self-help, the strike and lockout, are forbidden.⁴¹

He also would substitute "compulsory settlement" for "compulsory arbitration" as a more useful and meaningful terminology.

There is another and different "compulsory arbitration" known to the legal lore of Pennsylvania. It has nothing to do with the enforcement of arbitration agreements qualifying under the Pennsylvania arbitration statute, which follows the pattern of the 1920 New York arbitration

39. See, *United Gas Workers v. Wisconsin Employ. Rel. Bd.*, 255 Wis. 154, 38 N.W. 2d 692 (1949).

40. In *Amalgamated Ass'n of St. Elec. Ry. Employees v. Wisconsin Employ. Rel. Bd.*, 340 U.S. 383, 388 (1951), the majority of the Supreme Court found that the state statute offended pertinent constitutional requirements subordinating such state laws to the National Labor Relations Act for the reason at least that "the act substitutes arbitration upon order of the Board for collective bargaining whenever an impasse is reached in the bargaining process."

41. Williams, *The Compulsory Settlement of Contract Negotiation Labor Disputes*, 37 Texas L. Rev. 587, 588 (1949); see Gordon, *Compulsory Arbitration of Labor Disputes*, 30 Mich. S.B.J. 9 (Nov. 1951); Sanders, *Types of Labor Disputes and Approaches to Their Settlement*, 12 Law & Contemp. Prob. 211 (1947); Stanford, *Compulsory Arbitration—A Solution for Industrial Decay?*, 13 U. Pitt. L. Rev. 462 (1952). Professor Simpson writing before the enactment of these state statutes defined the exact sense in which he used the term as follows: It "refers to the settlement of industrial disputes through adjudication by a governmental tribunal acting under legislative authority, where there is a direct legal sanction for the enforcement of the decision of the tribunal. Resort to non-pacific tactics by either of the parties to the dispute is prohibited by law both pending and after award. Self-help in industrial disputes is entirely done away with; adjudication takes its place." Simpson, *Constitutional Limitations on Compulsory Industrial Arbitration*, 38 Harv. L. Rev. 753, 759 (1925). On the other hand, Professor Updegraff, writing in 1950 and covering the foregoing state utility legislation, deals with those acts as embodying compulsory settlement or arbitration. Updegraff, *Compulsory Settlement of Public Utility Disputes*, 36 Iowa L. Rev. 61 (1950).

statute,⁴² nor is it a program for resolving disputes arising between employer and union in the public utility field or elsewhere. It is used in referring to the "compulsory submission" statute⁴³ of the state. This statute provides for the "compulsory submission" of selected civil claims in pending litigation to an established panel of lawyers. The "compulsion" lies in the unilateral power given by the legislation whereby the plaintiff or defendant may require the reference of the matters in issue in their pending action to lawyers assigned to hear and decide (rather than to judge or jury), without the other party's consent. The major purpose of the program is to expedite the disposition of civil actions to collect small money claims and thereby relieve the civil dockets for larger claims. It has been praised for accomplishing its purpose very well.⁴⁴

The statute involves the reference of the claims embraced in the action without requiring any agreement by the parties for arbitration.⁴⁵

42. Pa. Stat. Ann. tit. 5, §§ 161-81 (1930) (Supp. 1960), entitled "Arbitration Under Contracts Providing Therefor."

43. Pa. Stat. Ann. tit. 5, §§ 21-81 (1930) (Supp. 1960).

44. See Application of Smith, 381 Pa. 223, 112 A.2d 625, appeal dismissed per curiam sub nom. Smith v. Wissler, 350 U.S. 853 (1955). Chief Justice Stern stated in reference to the original act as amended in 1952: "It has many obvious advantages. It is clearly designed to meet the situation which prevails in some communities of jury lists being clogged to a point where trials can be had only after long periods of delay—a condition resulting largely from the modern influx of negligence cases arising from automobile accidents in a great number of which no serious personal injuries are involved. Removing the smaller claims from the lists not only paves the way for the speedier trial of actions involving larger amounts, but, what is of equal or perhaps even greater importance, makes it possible for the immediate disposition of the smaller claims themselves, thus satisfying the need for prompt relief in such cases. By the same token and working to the same end, the use of the Act will free courts for the speedier performance of other judicial functions. Moreover there will be a saving to claimants of both time and expense by reason of greater flexibility in fixing the exact day and hour for hearings before the arbitrators as compared with the more cumbersome and less adaptable arrangements of court calendars. The operation of the Act has proved eminently successful in all respects, it appearing from statistics gathered in 19 of the 31 counties or more which have thus far put the statute into effect that there were 585 cases tried by arbitrators under its provisions in the period from July 1 to December 28, 1954, in only 30 or 5% of which appeals were taken to the courts of common pleas. It would seem clear, therefore, that the system of arbitration set up by this statute offers encouraging prospects for the speedier administration of justice in the commonwealth." 381 Pa. at 229-30, 112 A.2d at 629. See also authorities cited in note 5 supra.

45. Pennsylvania, like several other jurisdictions, also has statutory provisions for voluntary submission of pending actions (except those with respect to title to real estate) to arbitrators. Such references are made by agreement of the parties for arbitration of the matters in controversy and rule of court upon the submission. See Pa. Stat. Ann. tit. 5, §§ 1-8 (1930). Concerning the status of these references by agreement of the parties to arbitrate, and rule of court as distinguished from certain compulsory references per

On the other hand, it frequently relies upon the very terms "arbitration," "arbitrators," "board of arbitrators," and "award" in its various prescriptions as to the submission, to the lawyer personnel appointed to hear and decide the cause as referred to them from the court, and to their decision.⁴⁶ In general, the statute delegates authority to designated trial courts to carry out the contemplated submissions under rules to be promulgated by the respective courts.

According to a recent amendment of this act, the several courts of common pleas, the County Court of Allegheny County and the Municipal Court of Philadelphia may, by rules of court, provide that all cases which are at issue where the amount in controversy shall be two thousand dollars . . . or less, except those involving title to real estate, shall first be submitted to and heard by a board of three . . . members of the bar within the judicial district.⁴⁷

The plaintiff must have filed his complaint before he can require the reference, and, comparably, the defendant must have filed his answer before he can require it.⁴⁸ The "board of arbitrators" shall consist of three members of the bar within the judicial district; they are to be appointed by the prothonotary "from the list of attorneys qualified to act."⁴⁹ Such appointment is to be made "ten . . . days after the case is at issue."⁵⁰ The board "shall make its report and render its award within twenty . . . days after hearing."⁵¹ The "award" shall be signed by at least a majority of the board and transmitted to the prothonotary. If the board shall fail so to transmit its report of award within seven days after it shall have agreed upon the same, the members shall have no compensation.⁵² It appears to be accepted that the arbitrators shall be paid ini-

statutes, see Annot., 55 A.L.R. 2d 420, 440 (1957). Voluntary references of pending actions, i.e., without the "compulsion" of the foregoing Pennsylvania act have been tried, successfully it is said, in New York. See Gutman, *Arbitration in the New York Municipal Court*, 16 *Arb. J. (n.s.)* 3 (1961).

46. It also may be noted that the Chief Justice's opinion as quoted in *Application of Smith*, 381 Pa. 223, 112 A.2d 625 (1955), spoke of the lawyer personnel appointed to hear and decide under the statute, as "arbitrators," and also of "the system of arbitration set up by this statute." The statute was also cited by the Chief Justice as authorizing "the courts to provide for compulsory arbitration" of controversies wherein the amount did not exceed the statutory amount. The opinion also indicated the court's awareness of "compulsory arbitration" and its illegality under the fourteenth amendment as ruled in the Supreme Court of the United States in the cases reviewed above which covered the Kansas Industrial Court Act. See notes 27-37 *supra* and accompanying text.

47. Pa. Stat. Ann. tit. 5, § 30 (Supp. 1960).

48. Pa. Stat. Ann. tit. 5, §§ 22, 24 (Supp. 1960).

49. Pa. Stat. Ann. tit. 5, § 31 (1930) (Supp. 1960).

50. *Ibid.*

51. *Ibid.* This provision has been held "directory," not "mandatory." *Damon v. Berger*, 191 Pa. Super. 165, 168, 169, 155 A.2d 388, 390. (Super. Ct. 1959); *Kuzemchak v. Bukofski*, 2 Pa. D.&C. 2d 810 (Luzerne County C.P. 1955).

52. Pa. Stat. Ann. tit. 5, §§ 51, 52 (1930).

tially by the county in amounts fixed by the court. Upon appeal from the award, partial reimbursement by the appellant is required.⁵³ The court shall receive such award and enter it in the proper dockets⁵⁴ and "every award so entered shall have the effect of a judgment, with respect to the party against whom it is made, from the time of entry thereof, and shall be a lien upon his real estate, until reversed upon appeal, or satisfied according to law."⁵⁵

An "award" may be set aside by the court in which the reference was made on due proof:

I. That the arbitrators misbehaved themselves in the course of the hearings before them.

II. That the award was procured by corruption, or other undue means.⁵⁶

There is provision for appeal from the "award" by either party and trial de novo in the court in which the action was pending when the reference was entered according to the following rules:

I. The party appellant, his agent, or attorney, shall make oath or affirmation, that "it is not for the purpose of delay such appeal is entered, but because he firmly believes injustice has been done."

II. Such party, his agent or attorney, shall pay all the costs that may have accrued in such suit or action.

III. The party, his agent, or attorney, shall enter into the recognizance hereinafter mentioned.

IV. Such appeal shall be entered, and the costs paid and recognizance filed, within twenty days after the day of the entry of the award of the arbitrators on the docket.

V. [A]ny party appealing shall first repay to the county the fees of the members of the board of arbitrators herein provided for, but not exceeding fifty per cent of

53. In *Application of Smith*, 381 Pa. 223, 112 A.2d 625 (1955), the Supreme Court of Pennsylvania declared its objection to the Rule of Court (Rule 43) as adopted under the statute by the Court of Common Pleas of Lancaster County fixing as it did fees of the arbitrators. The rule fixed the fee of each arbitrator at \$25 per case—\$75 total for the three on the board. The court declared such amount could not reasonably be required when, as in this case, the plaintiff's claim in the action was for only \$249.19. In this connection the court stated: "The rule adopted in Lancaster County which is here under consideration provides for compensation to the arbitrators in the sum of \$25 each, or a total of \$75, and the necessity of paying that amount as a condition for the right to appeal would seemingly operate as a strong deterrent, amounting practically to a denial of that right, if the case should involve only, as in the present instance, as little as \$250. Therefore this rule, as well as the rules adopted or to be adopted by the courts of common pleas of other counties, should take cognizance of this fact and should provide for a lower rate of compensation where only a comparatively small claim is involved. True, this might require an occasional sacrifice on the part of the members of the bar acting as arbitrators in such cases, but it is undoubtedly one that lawyers will cheerfully make in pursuance of those professional ideals which not infrequently lead them, under special circumstances and the observance of long-established traditions, to render service to a client without any compensation at all." 381 Pa. at 232-33, 112 A.2d at 630.

54. Pa. Stat. Ann. tit. 5, § 53 (1930).

55. Pa. Stat. Ann. tit. 5, § 54 (1930).

56. Pa. Stat. Ann. tit. 5, § 57 (Supp. 1960).

the amount in controversy. The balance of the arbitrator's fees shall be absorbed and paid by the county. Such fees shall not be taxed as costs or be recoverable in any proceeding. All appeals shall be de novo.⁵⁷

The recognizance required of plaintiff in favor of defendant shall be on the condition "that if he shall not, in the event of the suit, recover a sum greater, or a judgment more favorable to him than the award of the arbitrators, he shall pay all costs . . ." of the appeal, plus one dollar "for every day lost by the defendant in attending on such appeal."⁵⁸ If defendant is the appellant his recognizance is to be so conditioned that if plaintiff recovers judgment for a sum equal to or greater than the award, or a judgment more favorable than the award, defendant shall pay all costs of the appeal, "together with the sum or value of the property or thing awarded by the arbitrators," plus one dollar per day for each day lost by "plaintiff in attending to such appeal."⁵⁹

As indicated in subsection V of the statute, governing appeals from an award,⁶⁰ the appellant is required to reimburse the county for the fees paid to the arbitrators, "but not exceeding fifty per cent of the amount in controversy."⁶¹ It is reported that under the rules of court established in Montgomery County, greater flexibility in this respect is provided, namely: "The Court may . . . on cause shown and to prevent injustice or hardship, reduce the amount of this repayment or relieve appellant from such repayment in its entirety."⁶²

57. Pa. Stat. Ann. tit. 5, § 71 (1930) (Supp. 1960).

58. Pa. Stat. Ann. tit. 5, § 74 (1930).

59. Pa. Stat. Ann. tit. 5, § 75 (1930). In 1845 Justice Story writing about a system of "compulsive arbitrations" based on legislative authority commented: "[T]hese arbitrations are never, or at least not ordinarily, made compulsive to the extent of excluding the jurisdiction of the regular courts of justice; but are instituted as mere preliminaries to an appeal to those courts, from the award of the arbitrators, if either party desires it, so that the law, and in many cases, the facts also, if disputed, are re-examinable there. So that, in many cases, it will be found, that protracted litigation and very onerous expenses often follow as necessary results of the system." *Tobey v. County of Bristol*, 23 Fed. Cas. 1313, 1321 (No. 14065) (C.C.D. Mass. 1845).

60. See note 57 *supra*.

61. Pa. Stat. Ann. tit. 5, § 71 (Supp. 1960). In *Application of Smith*, 381 Pa. 223, 233, 112 A.2d 625, 630-31 (1955), the majority of the court approving the purpose of the provision in the statute that required appellant to reimburse the county for arbitrator's fees initially paid by it, commented as follows: "The requirement that the appellant repay to the county the fees of the arbitrators is obviously designed to serve as a brake or deterrent on the taking of frivolous and wholly unjustified appeals; if there were not such a provision the defeated party would be likely to appeal in nearly all instances and the arbitration proceedings would tend to become a mere nullity and waste of time." For a critical view of this deterrent to appeal see *McClure v. Boyle*, 141 N.E.2d 229 (Ohio C. P. 1957).

62. Swartz, *Compulsory Arbitration: An Experiment in Pennsylvania*, 42 A.B.A.J. 513, 515 (1956).

In *Application of Smith*,⁶³ the majority of the Supreme Court of Pennsylvania sustained the statute against the challenge that it denied the right of trial by jury assured by the constitution of the state.⁶⁴ The court took the view that the challenge of the statute on this ground required its determination as to whether or not

the statute closes the courts to litigants and makes the decision of the arbitrators the final determination of the rights of the parties . . . [that] there is no denial of the right of trial by jury if the statute preserves that right to each of the parties by the allowance of an appeal from the decision of the arbitrators or other tribunal . . . [and that] the only purpose of the constitutional provision is to secure the right of trial by jury before rights of person or property are *finally* determined. [In short] all that is required is that the right of appeal for the purpose of presenting the issue to a jury must not be burdened by the imposition of onerous conditions, restrictions or regulations which would make the right practically unavailable.⁶⁵

The court concluded that the statutory requirement that the appellant reimburse the county the amount of the fees paid by it to the arbitrators as provided in the statute, did not unduly burden the right of appeal. In a word, the "compulsion" to arbitrate was too insubstantial to work an unconstitutional denial of trial by jury.⁶⁶

While the parties are assured the right of a hearing before the "arbitrators," it is not determined by the statute whether or not they may, or shall, act like common law or statutory arbitrators in conducting the hearing and rendering an "award." While the foregoing provision in the act declaring causes to set aside the "award" might indicate otherwise, there is reason to believe that the arbitrators must "follow the law" more closely, at least, than traditions of common law arbitration require. It has been reported concerning the practice in Montgomery County that "rules of evidence are observed, but without too much formality. The arbitrators can eliminate incompetent evidence in their determination, much as in equity cases."⁶⁷ Concerning the practice in Delaware County it has been reported that

customary court room decorum is observed and usual rules of evidence obtain To the extent that questions of law are involved, the Board decides them on the basis of applicable legal precedents. However, the report or award takes the form of a jury verdict and need not contain a recital of facts nor a statement of reasons for the action taken.⁶⁸

63. 381 Pa. 223, 112 A.2d 625 (1955).

64. *Id.* at 230, 112 A.2d at 629.

65. *Id.* at 230-31, 112 A.2d at 629.

66. *Id.* at 231, 112 A.2d at 629.

67. Swartz, *Compulsory Arbitration: An Experiment in Pennsylvania*, 42 A.B.A.J. 513, 515 (1956).

68. Note, 8 Stan. L. Rev. 410, 416 (1955-1956). See also Rosenberg & Schubert, *Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*, 74 Harv. L. Rev. 443, 451 (1961).

There being no agreement for arbitration entered upon by the parties under the foregoing statute and there being doubt, at least, that the "arbitrators" are to act in the way that arbitrators customarily act, and there being the provision in the act for the right of appeal⁶⁹ and trial de novo in court of the issues submitted, the remoteness of resemblance of this "compulsory arbitration," like the others reviewed above, to any idea of arbitration as accepted in American jurisprudence is apparent.

69. Right of appeal from an arbitrator's award is provided in a few of the older general arbitration statutes. See *Shultz & Bro. v. Lempert*, 55 Tex. 273 (1881). Of course, arbitration under such statutes is had only on the parties' agreement so to arbitrate.